

No. 42298-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Aaron Hudspeth,

Appellant.

Thurston County Superior Court Cause No. 11-1-00182-6

The Honorable Judges Gary Tabor and Paula Casey

Appellant's Amended Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Hudspeth's motion to suppress.
2. The trial court violated Mr. Hudspeth's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of an overbroad warrant.
3. The police violated Mr. Hudspeth's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of an overbroad warrant.
4. The police violated Mr. Hudspeth's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
5. The search warrant was overbroad because it authorized police to search for and seize items for which the affidavit did not establish probable cause.
6. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
7. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.
8. The search warrant unlawfully authorized police to search for and seize "[n]otes and/or records and/or ledgers (including records stored on computer or other electronic medium) evidencing the acquisition, manufacture and/or distribution of controlled substances, as well as sources, customers, and/or other conspirators."
9. The search warrant unlawfully authorized police to search for and seize "records evidencing income from sales of controlled substances and/or the acquisition, possession or re-sale of assets purchased with proceeds of sales of controlled substances..."
10. The search warrant unlawfully authorized police to search for and seize "[a]ll monies, negotiable instruments, and/or other proceeds or assets acquired from proceeds of sales of controlled substances and otherwise seizable under RCW 69.50.505, as well as all weapons authorized to be seized under RCW... 69.50.505."

11. The search warrant unlawfully authorized police to search for and seize “[a]ny personal property or other assets subject to seizure under RCW 69.50.505.”
12. The trial judge erred by denying Mr. Hudspeth’s request for appointment of new counsel.
13. The trial judge applied the wrong legal standard in denying Mr. Hudspeth’s request for new counsel.
14. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Hudspeth and his court-appointed attorney.
15. Mr. Hudspeth was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
16. Defense counsel unreasonably failed to argue that the search warrant was overbroad.
17. The sentencing court erred by imposing a firearm enhancement.
18. The imposition of a firearm enhancement infringed Mr. Hudspeth’s Fourteenth Amendment right to due process because the evidence was insufficient to prove that he was “armed” with a firearm.
19. The firearm enhancement was imposed in violation of Mr. Hudspeth’s right to notice of the charge against him under the Sixth and Fourteenth Amendments, and under Wash. Const. Article I, Section 22.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this case, the search warrant was overbroad for both reasons. Must the evidence derived from execution of the overbroad search warrant be suppressed?
2. An accused person has a constitutional right to be represented by counsel, and to have counsel appointed if indigent. When

Mr. Hudspeth asked for the appointment of new counsel and described problems in the attorney-client relationship, the trial court denied his request without inquiring further. Did the court's refusal to inquire into the attorney-client relationship and denial of the request for new counsel violate Mr. Hudspeth's Sixth and Fourteenth Amendment right to counsel?

3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Hudspeth's defense attorney failed to argue that the search warrant was overbroad. If Mr. Hudspeth's argument that the warrant was overbroad is not preserved for review, was he denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. A firearm enhancement may not be imposed unless the state presents sufficient evidence that the offender was armed with a firearm. Here, the evidence was insufficient to prove that the handguns discovered in a container were easily accessible and readily available for offensive or defensive purposes, and that there was a nexus between the guns and the crime charged. Did the imposition of a firearm enhancement violate Mr. Pierce's Fourteenth Amendment right to due process?
5. An accused person may not be convicted of or sentenced for an uncharged enhancement. In this case, Mr. Hudspeth was alleged to have possessed methamphetamine with intent to deliver, while armed with a deadly weapon. Did the imposition of a firearm enhancement violate his right to due process and to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In the early morning hours of February 3, 2011, Tumwater police officers sought and obtained a telephonic search warrant for a garage in which Aaron Hudspeth allegedly lived. RP (6/13/11) 13-14. The warrant was based on information obtained from Natasha Olson, following a traffic stop and the discovery of methamphetamine and drug paraphernalia in her purse. Exhibit 1 (admitted 6/13/11), pp. 4-7, Supp. CP.

According to the telephonic affidavit, Olson told officers that she was on her way to obtain methamphetamine from Mr. Hudspeth. She said she had also acquired methamphetamine from him the day before. She explained that Mr. Hudspeth was fronting the methamphetamine (without payment) to a dealer named "Larry" in Mason County, and that she was picking it up and delivering it because she owed Larry money.¹ She also told police that she had seen two handguns in the garage. Exhibit 1, pp. 4-7, Supp. CP.

In his telephonic affidavit, the officer added that Mr. Hudspeth was a convicted felon. He also told the judge that he had made arrests and served search warrants for drug-related activity at Mr. Hudspeth's address,

¹ Olson's companion confirmed that he'd been driving her to obtain drugs. Exhibit 1, p. 6, Supp. CP.

and that he'd spoken with the property owner, who confirmed that Mr. Hudspeth lived there and that there was "a lot of narcotics activity coming from the property." Exhibit 1, p. 4, Supp. CP. The officer did not clarify the property owner's basis of knowledge. Exhibit 1, p. 4, Supp. CP.

The warrant authorized the police to search the property for:

[n]otes and/or records and/or ledgers (including records stored on computer or other electronic medium) evidencing the acquisition, manufacture and/or distribution of controlled substances, as well as sources, customers, and/or other conspirators...[R]ecords evidencing income from sales of controlled substances and/or the acquisition, possession or re-sale of assets purchased with proceeds of sales of controlled substances...

All monies, negotiable instruments, and/or other proceeds or assets acquired from proceeds of sales of controlled substances and otherwise seizable under RCW 69.50.505, as well as all weapons authorized to be seized under RCW 9.41.098 and 69.50.505.

Any personal property or other assets subject to seizure under RCW 69.50.505...

Exhibit 4 (admitted 6/13/11), Supp. CP.

Upon executing the search warrant, officers discovered methamphetamine, paraphernalia, and two handguns.² RP (6/21/11) 63-64, 68-77.

Mr. Hudspeth was charged with two counts of Unlawful Possession of a Firearm in the First Degree, and Possession of

² An addendum to the warrant was obtained when officers encountered a locked container. Exhibit 2 (admitted 6/13/11), Supp. CP.

Methamphetamine with Intent to Deliver.³ CP 2. The prosecution alleged that he committed the drug charge “while armed with a deadly weapon, to wit: a firearm.” CP 2.

Approximately one month prior to trial, Mr. Hudspeth filed a document captioned “Motion to Dismiss/Fire Attorney,” in which he asserted that his court-appointed attorney was ineffective and requested the appointment of new counsel. Motion to Dismiss/Fire Attorney, Supp. CP. He alleged that his attorney, Robert Jimmerson, had forgotten to file a suppression brief prior to a May 2nd suppression hearing, had failed to respond to phone calls, jail kites, and requests for paperwork, and hadn’t visited him in jail. Motion to Dismiss/Fire Attorney, Supp. CP.

His motion was heard at a hearing one week before the start of trial. At the hearing, Mr. Hudspeth told the judge that Jimmerson had only spent a total of three minutes with him, that he hadn’t seen Jimmerson at all in the preceding five weeks, that Jimmerson failed to respond to phone calls (including calls from his wife) or to visit him in the jail, and that Jimmerson hadn’t contacted any of his witnesses, even though trial was approaching. RP (6/13/11) 4-5. He told the judge he hadn’t received a copy of Jimmerson’s late-filed suppression brief, and that didn’t feel that

³ At trial, Mr. Hudspeth was acquitted of an additional charge of Possession of Marijuana with Intent to Deliver.

Jimmerson was “adequately prepared to take me to trial and to give me a decent case.” RP (6/13/11) 5. Although Jimmerson claimed he was ready for trial, he didn’t deny any of Mr. Hudspeth’s accusations.⁴ RP (6/13/11) 5-6.

The judge denied the motion without asking Mr. Hudspeth or Mr. Jimmerson any specific questions about their relationship. RP (6/13/11) 6-7.

Mr. Hudspeth moved to suppress the evidence seized when the search warrant was executed. In his written Motion to Suppress, Mr. Jimmerson erroneously claimed that the officer had not told the judge about the handguns, and that neither the initial warrant nor an addendum permitted seizure of the handguns. Motion to Suppress, pp. 2-3, Supp. CP. He also erroneously asserted that the officers had forced open a locked container prior to obtaining an addendum to the warrant authorizing them to do so. Motion to Suppress, pp. 3-4, Supp. CP.

The motion was denied. RP (6/13/11) 56-61. Following the hearing, Mr. Hudspeth again voiced his dissatisfaction with Jimmerson:

THE DEFENDANT: Can I appeal the process of for [sic] a new attorney because I don't feel I was properly represented today.

⁴ He did tell the court that he’d filed the suppression brief, and that he didn’t know why Mr. Hudspeth hadn’t received a copy. RP (6/13/11) 5-6.

THE COURT: Well, I will tell you that there's certain matters that can be appealed. An appeal comes after a conviction and so --

THE DEFENDANT: I can't appeal this process until after?

RP (6/13/11) 61-62.

At trial, the prosecution introduced evidence that Mr. Hudspeth emerged from the residence with his hands raised, a short period of time after the police knocked and announced their presence. RP (6/21/11) 46-47, 107, 124, 163. When the officers searched the house, they found drugs and evidence of distribution. RP (6/21/11) 70. In addition, they found a case located near a stool. RP (6/21/11) 63. Inside the case was another box, containing a pistol. Underneath this box (inside the case), the officers found a revolver. The revolver was unloaded. Evidence was conflicting as to whether or not the magazine found with the pistol was actually inserted into the gun. RP (6/21/11) 63-66, 83, 129, 141, 168-169, 182.

Mr. Hudspeth was convicted following trial, and the jury found that he was armed with a firearm.⁵ CP 10. He was sentenced to a total of 120 months in prison, which included a 36 month firearm enhancement. CP 22. He timely appealed. CP 4.

⁵ He was acquitted of Count IV, Possession of Marijuana With Intent to Deliver. Verdict Form IV, Supp. CP.

ARGUMENT

I. THE SEARCH OF MR. HUDSPETH’S RESIDENCE VIOLATED THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7, BECAUSE THE SEARCH WAS CONDUCTED PURSUANT TO AN OVERBROAD SEARCH WARRANT.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo*. *State v. Garcia-Salgado*, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep*, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007).

A manifest error affecting a constitutional right may be raised for the first time on review.⁶ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable

⁶ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

- B. A search warrant must be based on probable cause and must describe with particularity the things to be seized.

The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the... things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). Washington’s constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.

Under both provisions, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*,

at 195; *Thein*, at 140. Generalizations cannot provide the individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution.⁷ *Thein*, at 147-148.

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.⁸ *State v. Maddox*, 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia*, *Perrone*, *supra*, and *State v. Riley*, 121 Wash.2d 22, 846 P.2d 1365 (1993)).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v.*

⁷ See also *State v. Nordlund*, 113 Wash.App. 171, 182-184, 53 P.3d 520 (2002) (“Nor is the [warrant] salvageable by the affidavit’s generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.”)

⁸ One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone*, at 545. The requirement also prevents law enforcement officials from engaging in a “general, exploratory rummaging in a person’s belongings...” *Perrone*, at 545 (citations omitted). Conformity with the rule “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone*, at 546.

Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone* at 547. In keeping with this principle, the particularity requirement “is to be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford*, at 485.

- C. The search warrant in this case was unconstitutionally overbroad: it authorized seizure of items for which probable cause did not exist (including items protected by the First Amendment), and failed to describe the things to be seized with sufficient particularity.

In this case, the affidavit lacked probable cause for a number of items listed in the warrant, including items protected by the First Amendment. The information provided by the affiant suggested that Mr. Hudspeth sold methamphetamine from his home, and had two handguns despite being a convicted felon. Exhibit 1, pp. 5-7, Supp. CP. The affidavit did not establish probable cause to believe any other evidence of criminal activity would be found at the residence. In fact, the affidavit did not even include the broad generalizations about the habits of drug dealers, of the type that invalidated the warrant in *Thein*, *supra*.

1. Notes and Records

The affidavit did not include any information establishing the existence or location of any “[n]otes and/or records and/or ledgers (including records stored on computer or other electronic medium)

evidencing the acquisition, manufacture and/or distribution of controlled substances, as well as sources, customers, and/or other conspirators.”

Neither of the two arrestees (whose statements provided the basis for the warrant) claimed to have seen any notes, records, ledgers, computers, or other electronic media. Nor did the affiant provide any other information establishing the existence or location of such materials. Exhibit 1, Supp. CP.

The affidavit did not mention any “records evidencing income from sales of controlled substances and/or the acquisition, possession or re-sale of assets purchased with proceeds of sales of controlled substances...” Exhibit 4, Supp. CP. Presumably, some income was realized from drug sales; however, nothing in the affidavit suggested records of such income. Likewise, the two arrestees made no mention of “assets” that Mr. Hudspeth may have purchased or sold. Exhibit 1, Supp. CP.

The search warrant also failed the particularity requirement, because it failed to describe these materials with “the most scrupulous exactitude.” *Stanford*, at 485. The warrant authorized police officers to rummage through a broad range of items protected by the First Amendment, including any written material, computer files, or other electronic media. Because the affidavit was not based on concrete

information relating to such materials, the officer was unable to provide the kind of particularized description required. *Id.*

The search warrant was overbroad. Because of this, the evidence must be suppressed, and the case dismissed with prejudice. *Perrone, supra.*

2. Money, weapons, and other personal property.

The affidavit did not establish that Mr. Hudspeth kept “monies, negotiable instruments, and/or other proceeds...” at his residence. Nor did the two arrestees provide information suggesting that any money or other proceeds would be found at the residence. Although Olson had been to the house for methamphetamine the day before, she told the officer that no money was involved. Her role was, in essence, as a courier between Mr. Hudspeth and a Mason County dealer named Larry. Exhibit 1, pp. 5-7, Supp. CP.

Nor did Olson describe any “assets acquired from proceeds of sales of controlled substances” or any “personal property or other assets subject to seizure under RCW 69.50.505.” She mentioned two handguns, but did not describe any knives, swords, clubs, or other weapons. Exhibit 4, Supp. CP.

Furthermore, the warrant itself was completely lacking in particularity with regard to such items. Nothing in the affidavit or the

warrant explained how the officers would determine which personal property or assets were subject to seizure. Without some information outlining the provenance of each item, the officers were left to guess at whether or not each object was acquired from proceeds, or subject to civil forfeiture. The use of broad categories such as “personal property” or “assets” transformed the warrant into an illegal general warrant, authorizing police to rummage through all of Mr. Hudspeth’s physical belongings, and to seize anything they thought might be acquired from proceeds or subject to civil forfeiture, without any restrictions whatsoever. Exhibit 4, Supp. CP.

Because the warrant was overbroad, the evidence must be suppressed. Mr. Hudspeth’s conviction must be reversed, and the case dismissed with prejudice. *Perrone, supra*.

II. THE TRIAL JUDGE VIOLATED MR. HUDSPETH’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT A NEW ATTORNEY.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *E.S., at* 702. A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wash.2d 580, 607, 132 P.3d 80 (2006).

The reviewing court considers three factors: (1) the extent of the conflict

between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir. 2002); *see also State v. Lopez*, 79 Wash.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998).

B. The trial judge infringed Mr. Hudspeth's right to counsel by failing to inquire into the nature and extent of the conflict between attorney and client, and by applying the wrong legal standard when denying the request for new counsel.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *Cross*, at 607. To compel an accused to "undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, at 607-610; *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). An

adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, at 610. The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’” *Adelzo-Gonzalez*, at 776-777 (citations omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.*, at 777-778. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*, at 778-779.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict and by refusing to appoint new counsel. In his *pro se* Motion to Dismiss/Fire Attorney, Mr. Hudspeth asserted that his attorney, Mr. Jimmerson was ineffective, and alleged that Jimmerson had forgotten to file a brief and failed to maintain adequate contact with his client. Motion to Dismiss/Fire Attorney, Supp. CP. At the June 13th hearing, Mr. Hudspeth provided additional details regarding these concerns. He asserted that he’d only seen Jimmerson for a total of three minutes since he’d been in jail, and that he hadn’t seen Jimmerson once in the preceding five weeks. He outlined Jimmerson’s failure to respond to phone calls or to visit him in jail, and asserted that Jimmerson

hadn't contacted any of his witnesses. RP (6/13/11) 4-5. He told the judge he hadn't received a copy of Jimmerson's late suppression brief, and didn't feel that Jimmerson was "adequately prepared to take me to trial and to give me a decent case." RP (6/13/11) 5. Although Jimmerson claimed he was ready for trial, he didn't deny any of Mr. Hudspeth's accusations.⁹ RP (6/13/11) 5-6.

Despite this, the trial judge failed to make any specific inquiries about Mr. Hudspeth's concerns, and failed to appoint new counsel. RP (6/13/11). Under the circumstances, this was error. Mr. Hudspeth alleged likely violations of RPC 1.1 (competence), RPC 1.3 (diligence), and RPC 1.4 (communication). He also suggested that Jimmerson's performance fell below an objective standard of reasonableness: Jimmerson hadn't contacted Mr. Hudspeth's witnesses, even though trial was scheduled to start the following week. RP (6/13/11) 5-6; *see State v. A.N.J.*, 168 Wash.2d 91, 109-113, 225 P.3d 956 (2010) (failure to adequately investigate or evaluate the strength of the prosecution's evidence constitutes deficient performance).

The judge also had before him Jimmerson's suppression motion, which was characterized by at least two obvious factual errors and thus

⁹ He did indicate that he'd filed the suppression brief, though late, and that he didn't know why Mr. Hudspeth hadn't received a copy. RP (6/13/11) 5-6.

provided further grounds for Mr. Hudspeth to lose confidence in his attorney. First, Jimmerson erroneously asserted that the telephonic affidavit and telephonic request for an addendum made no mention of the firearms. Motion to Suppress, pp. 2-3, Supp. CP. In fact, the telephonic affidavits (attached to Jimmerson's motion) do include mention of the handguns. Exhibit 1 (pp. 6-7) and Exhibit 2 (p. 2), Supp. CP; *see also* Attachments to Motion to Suppress, Supp. CP. The initial warrant specifically included authorization to search for and seize weapons. Exhibit 1, p. 2, Supp. CP.

Second, Jimmerson erroneously claimed that the officers had opened the locked container prior to seeking an addendum to the warrant.¹⁰ This, too, was contradicted by the materials he attached to his motion. Exhibit 2, p. 2, Supp. CP; *see also* Tumwater police report, p. 5 (attachment to Motion to Suppress, Supp. CP.)

Given Mr. Hudspeth's un rebutted assertions and the problems evident from a review of Jimmerson's written materials, the trial judge should have appointed new counsel. Failing that, he should have asked specific and targeted questions, encouraged Mr. Hudspeth to fully air his concerns, developed an adequate basis for a meaningful evaluation of the

¹⁰ The error was immaterial, as locked containers capable of concealing drugs could be opened under the original warrant.

problem and an informed decision, and conducted an inquiry sufficient to ease Mr. Hudspeth's dissatisfaction, distrust, and concern. *Cross*, at 610; *Adelzo-Gonzalez*, at 776-779.

The trial court's failure to do any of these things denied Mr. Hudspeth his Sixth Amendment right to counsel. *Cross*, *supra*. His conviction must be reversed and the case remanded for a new trial.¹¹ *Id.*

III. MR. HUDSPETH WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *A.N.J.*, at 109.

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const.

¹¹ In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott*, at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the

state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

C. Defense counsel unreasonably failed to argue that the search warrant was overbroad.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel's erroneously failed to argue that the search warrant was overbroad, and this failure prejudiced Mr. Hudspeth. First, there was no strategic purpose for a failure to argue that the warrant was overbroad. Indeed, counsel argued for suppression on alternate grounds; it would have been a simple matter to add an argument on the grounds that the warrant was overbroad.

Second, the argument was likely to succeed. As outlined above, the search warrant was impermissibly overbroad because it authorized police to search for and seize numerous items for which there was no probable cause, including material protected by the First Amendment. It

also gave the executing officers unlimited discretion to seize “personal property,” “assets,” and money. Exhibit 4, Supp. CP. Under these circumstances, argument on the grounds that the warrant was overbroad was likely to succeed.

Third, a successful motion would have resulted in suppression of the evidence and dismissal of the prosecution. Accordingly, the failure to seek suppression under the theory that the warrant was overbroad prejudiced Mr. Hudspeth.

For all these reasons, defense counsel’s failure to argue the correct grounds for suppression deprived Mr. Hudspeth of the effective assistance of counsel. *Saunders*, at 578. The conviction must be reversed and the case remanded. *Id.*

IV. THE FIREARM ENHANCEMENT VIOLATED MR. HUDSPETH’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE WAS “ARMED” WITH A FIREARM.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702..

- B. The prosecution failed to prove that the revolver and pistol found in a container were easily accessible and readily available for offensive or defensive use, or that there was a nexus between either gun and the crime.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing

enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

A firearm enhancement may only be imposed if the prosecution proves that the offender was “armed with a firearm” within the meaning of RCW 9.94A.533. The Supreme Court has expanded the definition of “armed” beyond the colloquial understanding of a person carrying a weapon; however, the “mere presence of a [firearm] at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed.” *State v. Brown*, 162 Wash.2d 422, 431, 173 P.3d 245 (2007). A person is armed with a firearm if it is “easily accessible and readily available for use for either offensive or defensive purposes;” in addition, “there must be a nexus between the defendant, the crime, and the weapon.” *Id.*

Washington Courts have consistently held that a defendant is not “armed” within the meaning of the statute, “even though he, presumably, could have obtained a weapon by taking a few steps.” *State v. Ague-Masters*, 138 Wash.App. 86, 104, 156 P.3d 265 (2007); *see also State v. Gurske*, 155 Wash.2d 134, 143, 118 P.3d 333 (2005). For example, a defendant arrested at his home (after offering to sell drugs to an undercover agent) is not “armed” with a firearm, even if a rifle is found under his bed. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993).

In this case, when police knocked on the door and announced their presence, Mr. Hudspeth came out of his house with his hands raised. RP (6/21/11) 46-47, 107, 124, 163. He was not in close proximity to the revolver and pistol when they were discovered during the search. The pistol was found in a box that was located inside another container. The revolver was found in this larger container, beneath the box that held the pistol. Access to the interior of one of these two containers required latches to be flipped open. RP (6/21/11) 63-66, 168-169, 182. There was no evidence introduced that the revolver was loaded. A magazine with bullets was taken into evidence; however, the testimony conflicted as to whether the magazine was inserted into the pistol or merely nearby. RP (6/21/11) 65, 83, 129, 141.

These two handguns were less accessible than the rifle found under the bed in *Valdobinos*. Furthermore, as in that case, Mr. Hudspeth made no attempt to put his hands on either gun when the police arrived. RP (6/21/11) 46-47, 107, 124, 163. All of these factors make Mr. Hudspeth's case like *Valdobinos*, and distinguish it from cases in which the defendant was found to be armed. *See, e.g., State v. Schelin*, 147 Wash.2d 562, 55 P.3d 632 (2002).

The evidence was insufficient to prove that Mr. Hudspeth was armed with a firearm. *Valdobinos, supra*. Because of this, the firearm enhancement must be vacated and the case remanded for correction of the Judgment and Sentence. *Id.*

V. THE SENTENCING COURT VIOLATED MR. HUDSPETH'S CONSTITUTIONAL RIGHTS TO ADEQUATE NOTICE BY UNLAWFULLY IMPOSING A FIREARM ENHANCEMENT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S., at 702.*

B. Mr. Hudspeth's case is controlled by *Delgado*.

A sentencing court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 234, 204 P.3d 936 (2009) (citing *Recuenco, supra*). This is so for two reasons: (1) a person can only

be convicted of and sentenced for enhancements actually charged by the prosecution, and (2) imposition of a firearm enhancement without prior notice violates due process. *Delgado*, at 234-235.

In *Delgado*, the prosecution alleged in several counts that the defendant was “armed with a deadly weapon, to wit: a firearm.” *Id.* at 235. The sentencing court imposed firearm enhancements rather than deadly weapon enhancements. *Id.* at 236. In accordance with *Recuenco*, the Court of Appeals vacated Delgado’s firearm enhancements and remanded for resentencing with deadly weapon enhancements. The Court noted that the defendant was not charged with firearm enhancements, and thus could not be sentenced with firearm enhancements. *Id.* at 237-238.

Under *Delgado*, Mr. Hudspeth’s firearm enhancement must be vacated and the case remanded for sentencing with a deadly weapon enhancement. As in *Delgado*, the Information alleged that Mr. Hudspeth “was armed with a deadly weapon, to wit: a firearm,” when he committed Count III. CP 2. Upon a proper finding by the jury, this charging language authorized the sentencing court to impose a deadly weapon enhancement of 12 months. *Delgado, supra*. The sentencing court was not authorized to impose the lengthier firearm enhancement. *Id.*

Accordingly, Mr. Hudspeth's firearm enhancement must be vacated, and the case remanded for imposition of a deadly weapon enhancement. *Delgado, supra*.

CONCLUSION

For the foregoing reasons, Mr. Hudspeth's convictions must be reversed. The evidence must be suppressed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

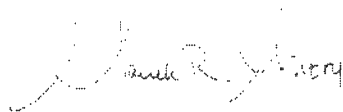
If the convictions are not reversed, the firearm enhancement must be vacated, and the case remanded for imposition of a deadly weapon enhancement.

Respectfully submitted,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

Aaron Hudspeth, DOC #716816
Coyote Ridge Corrections Center
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Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

John C Skinder
Thurston County Prosecuting Attorney
paoappeals@co.thurston.wa.us

I filed the Appellant's Amended Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 2, 2011.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

December 02, 2011 - 8:31 AM

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